MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

DATUK MOHD. SALLEH & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[SUIT NO. C23-636-1986]
18 APRIL 1988

CIVIL PROCEDURE: *Summary judgment - Circumstances under O. 14 RHC when final judgment can be entered - Not allowable if one triable issue raised - Oral evidence required.*

CONTRACT: *Novation - Meaning of consent - Circumstances where novation can be construed - A liable issue - New party - Discharge of old party.*

The first defendant borrowed monies from the plaintiff and failed to repay. The second defendant later undertook to pay the said sums in consideration of the plaintiffs forebearance to sue the first defendant. The second defendant failed to pay. The plaintiffs sued for the monies due and owing. The defendants avered in the defence, *inter alia*, novation. The plaintiffs applied to enter final judgment under O. 14 of RHC. The Senior Assistant Registrar refused to allow the plaintiff's application and the plaintiff's appealed against this decision to the judge in chambers.

Held:
There was novation from the circumstances and the consent required could only be construed from the oral evidence of all parties at trial. A triable issue was raised and therefore final judgment cannot be allowed.

[Appeal dismissed with cost.]

Cases referred to:
Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd. [1969] 1 All ER 143

Legislation referred to:
Banking Act 1973, s. 2
Rules of the High Court 1980, O. 56 r. 2, (2), O. 14

Other sources referred to:
Encyclopaedia of Forms and Precedents, 4th Edn., p. 411
Halsbury's Laws of England, 3rd Edn. Vol. 8 & 9, para. 580

For the appellants/plaintiffs - Too Hing Yeap; M/s. Shook Lin & Bok
For the 1st respondent/1st defendant - Charles Ong; M/s. Jayaraman, Ong & Co.

JUDGMENT

Gunn Chit Tuan J:

This was an appeal by Malaysian International Merchant Bankers Bhd. (the plaintiff) against the decision of the Senior Assistant Registrar given on 22 January 1987, refusing to grant an order that the plaintiff be at liberty to sign final judgment in this action against Datuk Mohd. Salleh b. Mohd. Yusof (the 1st defendant) for the sums prayed for in the statement of claim with interest up to the date of judgment and costs. The said appeal was heard by me in chambers on 29 October 1987, when I dismissed the appeal with costs. On 30 October 1987, the solicitors for the plaintiff wrote to the Senior Assistant Registrar under O. 56 r. 2

of the Rules of the High Court 1980, to apply for adjournment of the matter into open court for further arguments. I agreed to adjourn the matter into open court but the said solicitors later wrote to the Senior Assistant Registrar on 18 December 1987, stating that they would only repeat all the arguments already advanced before the judge in chambers and did not have any other matter for arguments in open court. They also requested that the judge certify that he did not require further arguments in open court. For some administrative reasons the said letter of 18 December 1987, was not brought to my attention until 9 March 1988, when the solicitors for the plaintiff wrote another letter to the Senior Assistant Registrar and I therefore issued a certificate worded slightly different from the ones usually issued under O. 56 r. 2(2) of the Rules of the High Court 1980.

In an affidavit affirmed by one Mohd. Razali P.N. Wong on 1 October 1986, (encl. 18) reference was made to the statement of claim dated 17 March 1985, in which it was averred that by a written agreement dated 9 May 1984, (the Loan Agreement), the plaintiff granted the 1st defendant a loan of RM2,300,000 to be repaid with interest and on the terms and conditions contained therein. In breach of the terms of the Loan Agreement the 1st defendant failed or neglected to repay the principal amount of the aforesaid loan together with interest on or before 11 May 1985, and the amount due from the 1st defendant as on 31 May 1985, was RM2,330,853.56¢. On or about 16 June 1985, a sum of RM400,000 was remitted towards total settlement of outstanding interest and the balance to account of payment of principal.

By a written undertaking dated 13 August 1985, one Raju Jayaraman Kerpaya, (the 2nd defendant), for the consideration stated therein, irrecovably and unconditionally undertook to pay the plaintiff the full sum of the loan and interest outstanding by 30 September 1985. The amount outstanding on 13 August 1985, was RM1,930,853.56 as principal and RM53,622 as interest. The amount due on 30 September 1985, was RM2,031,8484.14. The said written undertaking by the 2nd defendant was as follows:

Mr. Raju Jayaraman Kerpaya
c/o Jayaraman Ong & Co.
George Town Chambers
39 Beach Street
Penang

13 August 1985

Malaysian International
Merchant Bankers Berhad
4th Floor Bangunan MIDF
195-A Jalan Tun Razak
Kuala Lumpur

Dear Sirs

Loan of RM2.3 Million
From MIMB to Datuk Mohd.
Salleh B Mohd. Yusof
Loan Agreement
Dated 9 May 1984
Principal Outstanding
As at 31 July 1985:
RM1,930,853.56
Interest Outstanding
As at 31 July 1985: RM53,622

I understand that Datuk Mohd. Salleh b Mohd Yusof (DMSY) has defaulted in the repayment of all sums due under the above-said Loan Agreement. I understand that the outstanding amount is RM1,984,475.56 (consisting of RM1,930,853.56 principal outstanding and RM53,622 interest outstanding.)

In consideration of you forebearing to commence any legal or other proceedings to recover all sums due and outstanding from DMSY to MIMB, I hereby irrevocably and unconditionally undertake to pay you full sum of the loan and interest outstanding by 30 September 1985.

In the event that I do not pay the said sums by 30 September 1985, I hereby agree that MIMB will be at liberty to take such legal proceedings as they deem fit against, *inter alia*, myself.

Yours faithfully,
Signed: Raju Jayaraman Kerpaya
Witness: Signed: Mahathir Md..?

The 2nd defendant did not settle "the full sum of the loan and interest outstanding by 30 September 1985" and was in breach of the said written undertaking.

On or about 10 October 1985, the 2nd defendant forwarded a cheque for RM500,000 towards settlement of "the loan of RM2,300,000 to the 1st defendant". The said cheque was cleared on 12 October 1985.

It was averred that by another letter dated 13 November 1985, the 2nd defendant proposed repayment of the outstanding principal and interest due from the 1st defendant (amounting to RM1,531,848 as principal and RM20,608 as interest as on 31 October 1985) by instalments. The said letter of 13 November 1985, was as follows:

4th Floor, Bangunan MIDF
195A Jalan Tun Razak
P.O.Box 12250
Kuala Lumpur 16-01

Malaysian International
Merchant Bankers Berhad MIMB

Private & Confidential

13 November 1985

Mr Raju Jayaraman Kerpaya
c/o Jayaraman Ong & Co
George Town Chambers
39 Beach Street
Penang

Dear Sir

Loan of RM2.3 Million to Datuk Mohd. Salleh Yusof Principal Overdue as at 31 October 1985: RM1,531,848 Interest Overdue as at 31 October 1985: RM20,608

We refer to the meeting between our YB Datuk Dr. SMA Alhady and Ms Carol Ong and yourself at MIMB Office on 13 November 1985 in regard to your repayment proposal for the above overdue.

Your repayment proposal refers to the following:

1) First Principal Repayment of RM500,000 by 15 March 1986 with interest to be serviced monthly;

2) Either

a) Second Principal Repayment of RM500,000 by end of July 1986 with interest to be serviced monthly;

b) Balance Principal Repayment by end of November 1986 with interest to be serviced monthly;

Or

Full Principal Repayment on conclusion of the sale of Cocoa Processors Sdn. Bhd.;

whichever is earlier.

The above repayment proposal is subject to the following conditions:

1) The shares of Cocoa Processors Sdn. Bhd. to be registered in the name of MIMB Nominees Sdn. Bhd. but no exercise whatsoever of any rights accrued thereby to MIMB Nominees Sdn. Bhd. except in the event of due default of any Principal Repayment as above.

2) Submission of the latest audited and other accounts of Cocoa Processors Sdn. Bhd.

Provided upon full payment of account, MIMB Nominees Sdn. Bhd. will return with executed blank transfers together relevant share certificates thereof free from all claims, etc.

If you are agreeable to the above, please sign and return the original of this letter to us.

Yours faithfully,

Signed: Carol Ong Soh Hoon

Manager - Banking.

To: Malaysian International Merchant Bankers Berhad

I, Raju Jayaraman Kerpaya, hereby agree to the above as amended.

Signed: Raju Jayaraman Kerpaya.

It was averred that it was an implied term of the said repayment schedule that if the 2nd defendant defaulted in any payment as proposed, the whole remaining balance would become repayable forthwith. The 2nd defendant in breach of his obligations failed to comply with the said repayment schedule. No interest payment has been made since 13 November 1985 and the 2nd defendant has not up to the date of issue of the writ paid the first instalment of RM500,000. It was also averred that the 1st defendant had failed or neglected to pay the outstanding principal and interest due in breach of his contractual obligation and the plaintiff therefore claimed from both defendants:

(a) the sum of RM500,000;

(b) the interest on the whole outstanding amount as at 15 March 1986, amounting to RM102,761.55;

(c) the interest thereon at 14.5% per annum or RM198.63 per day from 16 March 1986, up to the date of payment or realisation;

(d) the sum of RM1,031,848.14;

(e) the interest thereon at 14.5% per annum or RM409.91 per day from 16 March 1986 up to the date of payment or realisation;

(f) costs.

During the hearing of the appeal from the decision of the learned Senior Assistant Registrar on 29 October 1987, Mr. Too, Counsel for the plaintiff, stated that the first issue raised by the 1st defendant was that the plaintiff is an unlicensed money lender and not a bank within the Banking Act and as such the transaction between the parties was null and void. He referred to s. 2 of the Banking Act 1973, and merely submitted that no moneylender's licence was required in this case.

Secondly, it was pointed out by Mr. Too that it was contended by the 1st defendant that there has been novation of the contract, but Counsel submitted that before there could be novation the plaintiff must have consented to the release of the 1st defendant. He then referred to Vol. 8 of Halsbury's *Laws of England* (3rd Edn.) on the meaning of "novation" which is as follows:

> Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction, and thus affords a defence to any action upon the old contract.
>
> For novation to ensue there must be not only the substitution of some other obligation for the original one, but also the intention or *animus novandi*.

Counsel stated out that there was absence of consent on the part of the plaintiff. He also referred to the above mentioned letter of 13 August 1985, and 13 November 1985, as well as the following letter of 1 October 1985, from the 2nd defendant to the Chairman of the plaintiff:

> Jayaraman, Ong & Co.
> George Town Chambers,
> 39 Beach Street, Penang,
> Malaysia.
>
> My Ref: P/JK/MW/PG
> 1 October 1985.
> (Private & Confidential)
>
> The Chairman,
> Malaysian International Merchant
> Bankers Berhad,
> 4th Floor,
> Bangunan MIDF,
> 195A, Jalan Tun Razak,
> Kuala Lumpur, 16-01.
>
> Dear Sir,
>
> **Re: "Loan of RM2,300,000 granted to Datuk Mohd. Salleh bin Mohd. Yusof"**
>
> I refer to the above.
>
> Please find enclosed herewith RM500,000 made in your favour towards settlement of the above loan.
>
> In regard the payment of the balance, I shall be grateful if you would kindly grant me an appointment to see you to discuss the matter further.
>
> Yours very truly,
> Signed.

Mr. Too then stated that there was no evidence that the plaintiff had discharged that 1st defendant and has substituted the 2nd defendant for him.

Mr. Charles Ong, Counsel for the 1st defendant, referred to the following paras. 4 and 5 of the statement of defence of the 1st defendant:

4. Save and except that the 1st defendant is aware:

(a) that there was a meeting or more between the plaintiff's representatives and the 2nd defendant in or about August 1985 and that as a result thereof by a letter in writing dated 13 August 1985 by the 2nd defendant to the plaintiff, the 2nd defendant irrevocably and unconditionally undertook to pay the plaintiff the full sum of the loan and interest outstanding by 30 September 1985, in consideration of the plaintiff forbearing to commence any legal or other proceedings against the 1st defendant to recover all sums due and outstanding from the 1st defendant to the plaintiff;

(b) that a Bank Draft for RM500,000 was forwarded to the plaintiff on or about 10 October 1985;

(c) that there was meeting or more between the plaintiff's representatives and the 2nd defendant in or about November 1985 and that as a result thereof by two letters both purported to be dated 13 November 1985 from the plaintiff to the 2nd defendant, one corrected by the 2nd defendant and the other a retyped version of the letter as corrected and accepted by the 2nd defendant, the 2nd defendant proposed repayment of the outstanding principal and interest alleged to be due from the 1st defendant to the plaintiff as follows:

(1) 1st principal repayment of RM500,000 by 15 March 1986 with interest to be serviced monthly;

Either

(ii) 2nd principal repayment of RM500,000 by end of November 1986 with interest to be serviced monthly;

(iii) Balance principal repayment by end of November 1986 with interest to be serviced monthly;

Or

(iv) Full principal repayment on conclusion of the sale of Cocoa Processors Sdn. Bhd.

whichever was earlier;

the 1st defendant denies paras. 5, 6 and 7 of the statement of claim and puts the plaintiff to strict and detailed proof of the matters stated therein.

5. By reason and in consequence, *inter alia*, of:

(a) the letter of demand dated 17 June 1985 issued by the plaintiff's solicitors to the 1st defendant stated in para. 3 above;

(b) a letter in writing dated 13 August 1985 from the 2nd defendant to the plaintiff stated in para. 4(a) above and acted upon by the plaintiff;

(c) a Bank Draft for RM500,000 sent to the plaintiff on or about 10 October 1985 stated in para. 4(b) above; and

(d) two letters both purported to be dated 13 November 1985 from the plaintiff to the 2nd defendant stated in para. 4(c) above.

the 1st defendant avers that the plaintiff has agreed or ought to be deemed to have agreed to release the 1st defendant from all liability under the agreement set out in para. 2 of the statement of claim and to accept the 2nd defendant as debtor in the place instead of the 1st defendant. The 1st defendant shall adduce at the trial of this action evidence of the circumstances of the transaction in which the letters were given or obtained.

He then referred to the following paragraph in Vol. 15 of the *Encyclopedia of Forms and Precedents* (4th Edn.) at p. 411:

Classes of novation. There are two classes of novation: (1) where a new contract is substituted for an old one between the same parties, and (2) where a new contract is substituted for an old one between different parties. This note is mainly concerned with the second class. As to the first class it is Sufficient to say that the new contract must be of such a kind that the two cannot stand together, and the new contract therefore rescinds the old contract.

After that he also referred to paras. 3 *et seq* of the said affidavit of Mohd. Razali P.N. Wong affirmed on 1 October 1986 (encl. 18). He agreed that the above-quoted letter of 13 August 1985, (Exh. MRW6 to encl. 18) did not show any novation. But he then referred to the above-quoted letter of 13 November 1985 (Exh. MRW8 to encl. 18) and submitted that there was a triable issue in this case as to whether in the circumstances there was any novation of the agreement in question. He also submitted that there should be a trial so that the 1st defendant's Counsel could cross-examine the 2nd defendant on his (proposed) statement of defence.

In reply Mr. Too again referred to the above-quoted letter of 1 October 1985 (Exh. MRW7 to encl. 18) and contended that it did not show that there was any novation of the agreement.

Novation, no doubt, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter is discharged. Usually, but not necessarily, a novation takes the form of the introduction of a new party to the new contract and the discharge of a person who was party to the old contract. (See Vol. 9 Halsbury's *Laws of England* (4th Edn.) para. 580). Whether there was consent to novation may, however, be inferred from conduct without express words (*Chatsworth Investments, Ltd. v. Cussins (Contractors), Ltd.)* [1969] 1 A11 ER 143 and in this case I was of the view that there ought to be a trial to enable the Court after hearing oral evidence and having considered it together with documentary evidence to find whether in the circumstances of this case there was consent of all the parties for the purposes of novation.

Since there is, albeit, only one triable issue, nevertheless, I considered that this was not an appropriate case for leave to be granted to enter final judgement by the summary procedure under O. 14 of the Rules of the High Court, 1980, and for that reason dismissed the appeal with costs.

Also found at [1988] 2 CLJ 90